Supreme Court, U.S.
FILED
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No.

In The
Supreme Court of the United States

October Term, 1996

ANTHONY ROBERT REDGE,

Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

On Petition For Writ of Certiorari To The Circuit Court of Oakland, State of Michigan

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DID THE CIRCUIT COURT ERR IN FINDING THAT THE DISTRICT COURT JUDGE DID NOT ERR IN DISMISSING CASE AGAINST DEFENDANT YET REMANDING THE CASE FOR TRIAL AFTER JEOPARDY HAS ATTACHED?

LIST OF PARTIES

There are no parties to this proceeding who are not revealed in the caption of this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Anthony Robert Redge respectfully requests this Court to issue a writ of certiorari to review the final decision of the Honorable Richard D. Kuhn, Circuit Court Judge, Oakland County Circuit Court, State of Michigan entered on April 12, 1995.

OPINIONS BELOW

The Opinion of the Honorable Richard D. Kuhn, Circuit Court Judge, Oakland County is reprinted in the Appendix at App. 1-5. The Opinion and Order of the Honorable Richard D. Kuhn, Circuit Court Judge, Oakland County denying Defendant's motion for reconsideration is reprinted in the Appendix at App. 6-9. The Michigan Court of Appeals' denial of Petitioner's application for leave to appeal is reprinted in the Appendix at App. 10. The Michigan Supreme Court's denial of Petitioner's application for leave to appeal is reprinted in the Appendix at App. 11.

JURISDICTION

On April 12, 1995, the Honorable Richard D. Kuhn, Circuit Court Judge, Oakland County, entered his Opinion and Order reversing the trial court's dismissal of the charge with prejudice. Petitioner timely filed a Motion for Reconsideration with the Honorable Richard D. Kuhn, Circuit Court Judge, Oakland County, On April 27, 1995, the

motion was denied on June 16, 1995.

On July 6, 1995, Petitioner timely filed an Application for Leave to Appeal to the Michigan Court of Appeals, the Application was denied on September 15, 1995.

On November 13, 1995, Petitioner timely filed an Application for Leave to Appeal to the Michigan Supreme Court, the Application was denied on July 29, 1996.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS

U.S. Const amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF CASE

On March 30, 1994, petitioner, Anthony Robert Redge, was arrested and charged with Operating an automobile while under the influence of Liquor (OUIL).

On July 21, 1994, a bench trial was held before the Honorable Gerald E. McNally of the 52nd/2nd District Court in the County of Oakland, State of Michigan. The Prosecutor failed to make an opening statement, and the Petitioner never waived the opening statement. After the first witness was sworn, the Petitioner moved to have the OUIL charge dismissed, as the prosecutor had failed to comply with Michigan Court Rule 2.507(A) which has a mandatory requirement that a prosecutor make an opening statement, unless there is a waiver.

The prosecutor then appealed to the

Oakland County Circuit Court in the State of Michigan. On April 12, 1995, the Honorable Richard D. Kuhn, entered an opinion and order that affirmed the District Court's dismissal for the violation of the Court Rule, but reversed the order of the District Court dismissing it with prejudice. The Oakland County Circuit Court, citing a case which relied on U.S. v. Scott, 437 U.S. 82 (1977), stated that Double Jeopardy did not bar the prosecutor from recharging the Petitioner, although the District Court had dismissed the OUIL charge after jeopardy had attached.

The Circuit Court stated that since the Petitioner sought to terminate proceedings on grounds unrelated to his factual guilt, the bar to being placed a second time in jeopardy in the U.S. Constitution did not prevent Petitioner's

retrial.

The Petitioner made an application for leave to appeal to the Michigan Court of Appeals on the Question of whether the bar of being placed twice in jeopardy in the Fifth Amendment of the U.S. Constitution was violated by the Circuit Court's Order allowing the Petitioner to be retried for the same actions he was placed in jeopardy for once already. The Michigan Court of Appeals denied the application.

The Petitioner made an application for leave to appeal to the Michigan Supreme Court, the court of last resort in the State of Michigan, on the same grounds that the Petitioner made his application to the Michigan Court of Appeals. The Michigan Supreme Court denied the application on July 29, 1996.

REASONS FOR GRANTING THE PETITION

The U.S. Supreme Court incorrectly ruled in U.S. v. Scott, 437 U.S. 82 (1977), that it does not violate the Double Jeopardy clause of the Fifth Amendment to allow the government to retry an individual after a dismissal when the Defendant had already been placed in jeopardy at the time of the dismissal.

In Scott, the majority held the purpose of the Double Jeopardy clause of the Fifth Amendment is as follows:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. Scott at 87.

After stating this principle, the

Court somehow concluded that Defendant's right not to be placed twice in jeopardy had not been violated although Defendant has been placed in jeopardy and the trial court dismissed the charges without their being a factual determination of whether the defendant was guilty of the charged offense.

As Justice Brennan pointed out in his dissent, which was joined by three(3) other justices, the stated principle was not served by the decision in Scott. Brennan wrote:

> It is manifest that the reasons that bar a retrial following an acquittal are equally applicable to a final judgment entered on a ground "unrelated to factual innocence." The heavy personal strain of the second trial is the same in either case. So too is the risk that, though innocent, the defendant may be found guilty at a second trial. If the appeal is allowed in either situation, the Government will, following any reversal, not only obtain the benefit of the favorable appellate ruling but also be permitted to shore up

any other weak points of its case and obtain all the other advantages at the second trial that the Double Jeopardy Clause was designed to forbid. Scott at 108.

The purpose of the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution was not upheld in the Court decision in Scott, as it allows prosecutors who make mistakes which would cause a dismissal of the charges to gain a strategic advantage from his or her mistake. Further, it keeps the personal strain of having to be place in jeopardy a second time on the defendant, which is what the Double Jeopardy Clause of the Fifth Amendment is designed to prevent.

Respectfully submitted,

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-v-

No. 94 DA6134 AR

ANTHONY ROBERT REDGE,

Defendant.
_____/

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OPINION AND ORDER AFFIRMING IN PART AND REVERSING IN PART ORDER OF DISTRICT COURT AND REMANDING TO DISTRICT COURT

At a session of said Court, held in the Courthouse in the City of Pontiac, County of Oakland, and State of Michigan, on this 12th day of April, 1995.

PRESENT: HONORABLE RICHARD D. KUHN,
CIRCUIT JUDGE

This matter is before the Court on the People's appeal from an Order of Dismissal entered on July 21, 1994 by the Honorable Gerald McNally, 52nd/2nd Judicial District Court. Having reviewed the briefs and the lower court record, the Court makes the following determinations.

The facts appear to be as follows. The case was set for trial. After the case was called, the Assistant Prosecutor omitted an Opening statement and proceeded to call the first witness. The witness was sworn by the Court, at which time the Defendant moved for dismissal pursuant to MCR 2.507(A) for failure to make an opening statement. The Court then granted Defendant's motion to dismiss, with prejudice.

The first issue before this Court is whether the district court judge properly

dismissed a charge of Operating Under the Influence of Liquor due to the fact that the People failed to make an opening statement. The Court Rule is very clear regarding this issue. MCR 2.507(A) provides:

> `...the party who is to commence the evidence must make a full and fair statement of that party's case and the facts the party intends to prove'.

The opening statement is mandatory, but "may be waived with the consent of the court and the opposing attorney". MCR 2.507(A). In this case, there was no agreement between the parties and the Court to waive opening statements, and the People cite no cases holding that silence may be treated as consent to the waiver of an opening statement. Therefore, the case was properly dismissed pursuant to MCR 2.507(A).

The second issue before this Court

is whether the double jeopardy clause bars the retrial of a Defendant who receives a dismissal based on a legal technicality unrelated to his factual guilt or innocence. The Court in People v. Knez, 173 Mich App 402, 404 (1988) set forth the applicable law on this issue:

> Where a Defendant deliberately chooses to seek termination of proceedings against him on a legal technicality unrelated to his factual guilt or innocence, the double jeopardy clause does not bar his retrial. United States v Scott, 437 US 82, 98-99; 98 S Ct 2187; 57 L Ed 2d 65 (1978), Reh Den 439 US 883 (1978).

Here the case against Defendant was dismissed for failure to make an opening statement, a legal technicality unrelated to Defendant's factual guilt or innocence. Therefore, the double jeopardy clause does not bar Defendant's retrial, and the trial court erred in dismissing the case with prejudice.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the Order of Dismissal entered in this case on July 21, 1994 by the 52nd/2nd District Court is affirmed with the exception of that portion of the order holding that the dismissal is "with prejudice", which is reversed.

IT IS FURTHER ORDERED AND ADJUDGED that this case is remanded to the 52nd/2nd District Court for further proceedings consistent with this Opinion.

"S/ Richard D. Kuhn"
RICHARD D. KUHN, CIRCUIT JUDGE

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-v-

No. 94 DA6134 AR

ANTHONY ROBERT REDGE,

Defendant.
_____/

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CHARLES Y. COOPER (P12199)
ATTORNEY FOR DEFENDANT
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OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION

At a session of said Court, held in the Courthouse in the City of Pontiac, County of Oakland, and State of Michigan, on this 16th day of June, 1995.

PRESENT: HONORABLE RICHARD D. KUHN, CIRCUIT JUDGE

This matter is before the Court on Defendant's Motion for Reconsideration.

Having reviewed the motion, lower court record and transcript, no oral argument having been ordered and no briefs having been submitted, the Court makes the following determinations.

The facts appear to be as follows. The case was set for trial. After the case was called, the Assistant Prosecutor omitted an opening statement and proceeded to call the first witness. The witness was sworn by the Court, at which time the Defendant moved for dismissal pursuant to MCR 2.507(A) for failure to make an opening statement. The Court then granted Defendant's motion to dismiss, with prejudice.

On appeal, in an Opinion and Order dated April 12, 1995, this Court remanded the case, affirming the District Court's Order of Dismissal, but reversing that portion of the order holding the

dismissal "with prejudice".

The issue now is whether this Court committed palpable error by not affirming in whole the district court's order of dismissal. Defendant argues that he was put in jeopardy by the first witness being called and the fact that the case was dismissed due to prosecutorial error. Defendant argues that for these reasons the district court properly dismissed the case with prejudice.

However, in People v Knez, 173 Mich App 402 (1988), cited in this Court's April 12 Opinion and Order, the Court held that the double jeopardy clause did not bar the Defendant's retrial, even though the first witness had already been sworn and commenced testimony, and the ground for dismissal was prosecutorial error. Therefore, Defendant's arguments

have no merit.

Finally, it should be noted that Defendant was not entitled to bring this motion. MCR 2.119(F)(1) provides for rehearing or reconsideration of the decision on a motion, not for rehearing or reconsideration of the decision on appeal from a district court. Thus, MCR 2.119(F) is inapplicable to the present case.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion for Reconsideration is denied.

"S/Richard D. Kuhn"
RICHARD D. KUHN, CIRCUIT JUDGE

Court of Appeals, State of Michigan

ORDER

Janet T. Neff
Presiding Judge

Richard A. Bandstra
Jane E. Markey

Judges

People v Anthony Robert Redge

Docket # 187210

L.C. # 94-DA6134-AR

The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented.

STATE OF MICHIGAN
COURT OF APPEALS

A true copy entered and certified by Ella Williams, Chief Clerk, on,

SEP 15 1995 "S/Ella Williams"
Date Chief Clerk

Michigan Supreme Court
Lansing, Michigan

Order

James H. Brickley
Chief Justice

Entered: July 29, 1996

104836

Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallet, Jr.
Elizabeth A. Weaver
Justices

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SC: 104836
COA: 137210
ANTHONY ROBERT REDGE, LC: 94-DA6134-AR

Defendant-Appellant.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

20723
SEAL OF THE MICHIGAN
SUPREME COURT LANSING

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify the foregoing is a true and complete copy of the order entered at the direction of the Court.

"S/ July 29" ,19 "S/96" "S/Corbin R. Davis
Clerk